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Islamic Council of Victoria
المجلس الاسلامي في فيكتوريا

11 November, 2005

Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
Parliament House
Canberra ACT 2600
Australia

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Dear Secretary,

Submission in relation to Anti-Terrorism (No. 2) Bill 2005 (Cth)

We refer to the Anti-Terrorism Bill (No. 2) 2005 (Cth) (**"the Bill"**).

We understand that the Committee will be inquiring into this Bill, and we tender this submission in order to assist the Committee's inquiry.

At the outset, we object to the lack of time allowed for meaningful debate of the Bill. This Bill involves momentous changes to Australian law and runs over a hundred pages. The changes have far-reaching implications for fundamental aspects of our democracy and are likely to have significant negative impact for the Muslim community in particular, a highly visible minority community whose members are already at high risk of being the victims of racial and religious discrimination.[1] This likelihood means that the Bill may in fact harm community cohesion and create divisions.

Having said this, the mainstream leadership of the Muslim community generally recognises the pressing need to tackle the issue of radicalism and the threat of terrorism,

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and to equip law enforcement authorities adequately to protect all Australians. We also unequivocally reiterate our condemnation of the murder of innocent people wherever it occurs.

However, our position has consistently been that there is no doubt that the threat of violent terrorism exists, but that stronger laws are not a panacea. A law and order approach has only limited effectiveness, and beyond this limit more stringent laws begin to infringe on fundamental democratic rights, for very little, if any, return in the way of additional security, while increasing the likelihood of abuse to an unacceptable degree. Moreover, in our view the government will be failing in its obligation to protect all Australians equally if it does not expend similar resources in the vital work of dialogue, strengthening community cohesion, and maintaining the inclusiveness, diversity and plurality that constitute some of the strengths of Australian society.

In any case, it is vitally important that any additional law enforcement powers should meet the criteria of being

a. justifiable and necessary;
b. effective against the threat;
c. proportionate to the threat;
d. accountable and open to public scrutiny; and
e. subject to judicial oversight.

We make the following specific comments about the Bill.

Lack of justification

The government has so far not demonstrated why this Bill is necessary. Very little justification has been given for the far-reaching measures it contains, or why the ends it aims to achieve are not achievable by other, less onerous means. The Prime Minister, John Howard, has said the Bill will "enable us to better deter, prevent, detect and

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[1] Ismaξ, Human Rights and Equal Opportunity Commission report on eliminating prejudice against Arabs and Muslims (March 2003).

prosecute acts of terrorism".[2] There has been, however, no explanation of how they will actually do this, and why the existing laws are inadequate.

The government has invoked the July London bombings as a reason for these new proposals. However, the London bombings cannot justify copying UK measures in place before they took place, i.e. control and preventative detention orders; measures that failed to prevent those bombings.

It is also important to note that the government's uncritical use of the UK's measures as a template is problematic in that the UK legislation operates under a different constitutional regime than that which exists in Australia. For example, human rights safeguards which exist in the UK may not similarly constrain authorities in Australia, or provide avenues under which to challenge and hold accountable the use of executive power.

With respect to the existing counter-terrorism laws, we note that the law enforcement operations that led to the arrests this week took place under existing powers. The arrests and charges have been made under existing criminal provisions, save for one minor amendment. We also note that persons have not been held without charge but have been publicly brought before the courts, and we fully support this approach.

However, as it stands, the law already provides for broad criminal offences and sweeping executive powers. The "terrorism" offences criminalise conduct far beyond acts like bombings and hijackings. Meanwhile, the panoply of sweeping executive powers means that Australia already has a detention without trial regime with respect to "terrorism" offences. In our submission, further criminalisation of nebulous concepts such as sedition, combined with the existing secrecy provisions, are unnecessary measures and unacceptably infringe on fundamental rights.

Financing Provisions

We understand and recognise the need to punish those who would direct funds for terrorist activity. However, given that these provisions carry with them a punishment of

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[2] John Howard, Prime Minister, 'Counter-Terrorism Laws Strengthened' (Press Release, 8 September 2005) 1.

imprisonment for life, we urge the Committee to re-draft the "financing provisions" of the Bill in more precise terms to avoid unintended consequences of the legislation.

The provisions in their current form require "recklessness" as to whether the recipient will use the funds for terrorism. The legislation uses the definition of recklessness in the Criminal Code which deems a person reckless if they are aware of a "substantial risk" of the money being misused, which is, in the circumstances, a risk that is "unjustifiable to take".

The common law standard for recklessness may arguably be higher because it refers to the case where one knows and disregards the probable consequences of one's actions.

The legislative definition is, we submit, too broad. When, for example, is a risk "substantial"? Is it more likely, or less, than probable? Is it merely possible? And under what circumstances is taking such a risk "unjustifiable"?

Such a standard could have the potential, for example, to affect all Australians who make charitable donations to disaster relief such as during the Boxing Day Tsunami.

For Australian Muslims in particular, charity is part of their basic obligations of Islamic practice, and Australian Muslims will observe this obligation. For example, fundraising efforts were undertaken following the tsunami and the Pakistan earthquake, and even in the normal course of events, Muslim charities regularly provide relief to parts of the Muslim world many other charities forget.

It is important to note that these financing provisions are intended to implement the recommendations of the Financial Action Task Force on Money Laundering; however, those recommendations required the criminalisation of giving or collecting funds *intending* or *knowing* that they will be used for terrorism.

This level of uncertainty in an offence that carries a penalty of life imprisonment must be addressed.

Detention without charge

Australians who have not been charged with or convicted of any crime may be detained under the Bill. The proposed control orders, for instance, will allow house-detention with 24 hours surveillance even if there is no suspicion that the jailed person is about to commit a crime. In the United Kingdom, preventative detention orders have been used against persons who have been found innocent by juries after a seven-month long criminal trial.[3]

Even more concerning are the provisions that prevent innocent Australians who have been detained from disclosing the fact that they have been detained, and the restrictions placed on them informing their loved ones about their circumstances during their detention.

We submit that such provisions are unnecessary and do little to protect our safety, are disproportionate to the nature of the threat, and unacceptably infringe on the civil rights of all Australians.

Powers should be evidence-based

The Bill permits severe restrictions of freedom without the need for proper evidence. Rather than requiring proof of the necessity of detention to an independent authority, the Bill gives the power to the police to authorise preventative detention for up to 24 hours, as well as certain other coercive powers.

Placing such coercive powers in the hands of law enforcement, with no effective check on the legality of their exercise of power, opens the door to mistakes and abuse. Although our law enforcement agencies are highly professional, mistakes have occurred in the past, as we saw recently when a Sydney man received an out-of-court settlement as a result of a mistaken raid. Such provisions undermine the balance between legal power and institutional culture that is at the heart of policing

[3] Derek Brown, 'Jurors speak out over terror laws', *Guardian Weekly,* 14-20 October 2005, 9.

We are concerned that control orders and preventive detention increase pre-emptive measures aimed at those who have not committed a violent offence but are suspected by the authorities of potentially committing an act in the future. These provisions increase the opportunity for pre-emptive policing based on speculative and erroneous evidence.

Standards of proof – presumption of innocence

The Bill also lowers the threshold of proof required for the use of coercive executive powers. Control and preventative detention orders can be issued if the requirements are satisfied on the balance of probabilities, instead of beyond a reasonable doubt. This represents a much lower standard for the possible incarceration of innocent individuals.

Hence, mere suspicion of guilt by police is sufficient for the detention of Australian citizens. In the case of the Muslim community, the results are likely to be disastrous. The assumption is likely to be "guilty until proven innocent", and the experience of detention on mere suspicion is not one that can be counted on to win many supporters of Australian democracy among its victims. Moreover, the fact that someone has been detained, though they are not guilty of any crime, is very likely to have a permanent impact on a person's future employment prospects, particularly if they come from a minority ethnic or religious background.

Religious profiling

A core characteristic of our democratic society is the rich diversity of political views and religious beliefs that constitute it.

In our submission the Bill threatens this diversity by increasing the likelihood that police will target Australians based on their religious or political views.

This stems from the fact that "terrorism" offences depend upon a person's political and/or religious motive.[4] By allowing police to exercise power without proper proof, it is quite possible that evidence of the person's political or religious beliefs alone would suffice. For the Muslim community, this could involve punishing persons solely on the basis of

[4] See definition of "terrorist act" in section 100.1 of the *Criminal Code Act* (Cth).

radical or extremist religious views. Besides being counterproductive, this constitutes an unjustifiable infringement on the democratic right of free speech.

There are adequate laws to prosecute those where there is evidence of planning or preparing a terrorist act. In our submission profiling radical religious views alone will be entirely counterproductive as a means of tackling terrorism and may only serve to entrench or harden resolve to violence. In fact, any "suspect" persons, whether they be Muslims, political activists or those who oppose the government's policies may be caught by such laws. The risk of misuse is, in our submission, an unacceptable one.

Sedition provisions and unpopular political views

We note once more that the operations and arrests this week were conducted successfully without the use of any new powers restraining the free expression of people's political views. Indeed, it might be said that such provisions would only drive those with radical views underground, muting their expression but only making it more difficult for law enforcement authorities and the community to become aware of them.

We also reiterate that punishing individuals for having or even expressing views that, while they may be radical, extreme, inflammatory, misguided, or otherwise unpopular politically, but do not cross the threshold into direct incitement to physical violence, is likely to be extremely counterproductive. We believe that such views should be tackled by positive and proactive measures such as engagement and dialogue, and that the use of anachronistic sedition offences will only harden the stances of those who already feel alienated and disenfranchised by government policies. It is only through strengthening our democratic freedoms and spaces for informed and open public dialogue that violence in the community can be approached.

Here we make a distinction between the laws proposed in the Bill and Victoria's *Racial and Religious Tolerance Act* (**"the RRTA"**), which is of a fundamentally different character to the Bill. Firstly, the Bill contemplates extraordinary law enforcement measures, with minimal judicial oversight, draconian detention and secrecy measures, and extensive unsupervised powers placed in the hands of police and security agencies. The RRTA's civil provisions, while they target speech, are of a much milder nature and any proceedings initiated must proceed through extensive mediation processes before an

open, public airing in the courts. Its criminal provisions only target direct incitement to violence and, again, are subject to the same open proceedings and judicial supervision. Finally, the RRTA does not target political beliefs.

In short, the RRTA protects citizens from discrimination and vilification on the basis of race or religion by providing a mechanism for hate speech to be curtailed in public judicial proceedings, while the Bill's sedition provisions expose a wide-ranging section of the community to criminal prosecution under secretive, draconian security measures on the basis of their political or religious views.

In conclusion, our submission is that the Bill should not be passed in its current form. Many of the aspects we have highlighted above should, we submit, be rejected entirely. Other sections contain serious flaws and must provide for far greater definition and clarity than is currently the case. In any case, no provision that constitutes an encroachment on Australians' democratic rights should be passed until full and proper evidence has been presented of its necessity and likely efficacy in tackling the specific threat that is contemplated.

We thank you for the opportunity to make this submission.

Yours faithfully

Malcolm Thomas
President